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No. 1216

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In the

Supreme Court of the United States

OCTOBER TERM, 1966.

ARTHUR C. ALLYN, JR.,

Petitioner,

vs.

ROBERT J. FLANNERY and WILLIAM MOORE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, is reported at 75 Ill. App. 2d 365, 221 N.E. 2d 89. The Supreme Court of Illinois denied petition for leave to appeal by summary order without opinion.

JURISDICTION

The judgment of the Appellate Court of Illinois, First District, was entered on October 6, 1966. A petition for leave to appeal was denied on January 18, 1967, by the Supreme Court of Illinois. Petition for writ of certiorari was timely filed on April 3, 1967, within ninety days. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (3).

QUESTIONS PRESENTED

1. Whether petitioner has waived any right to contest this judgment on constitutional grounds where no such constitutional defenses were raised in the trial court by any means available although the decision petitioner relies upon in this Court [*New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964)] was decided three months prior to the trial, and where petitioner attempts to explain this failure on the ground that his trial counsel was unaware of the decision.

2. Whether patrolmen, the lowest ranking members of the police force, patroling a beat under specific orders of their superiors, are public officials within the meaning of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) and subsequent Supreme Court decisions.

3. Whether petitioner was motivated by actual malice when he knew the contents of the libelous letter were false and wrote the letter with intent to harm the police officers.

Although the Petition is in unusual form, respondents will adopt petitioner's form in their brief for clarity.

THE HEART OF THE MATTER

This controversy concerns a libel by the petitioner against two patrolmen charging them, in writing, with the solicitation of a bribe, not with the honest belief that they committed the crime, but as the Appellate Court found, by translating known facts innocent in themselves into the charge of solicitation of a bribe.

Both substantively and procedurally this case presents the question whether a litigant, in a civil case, may shift his theory on appeal to an alleged violation of a constitutional right where the theory was not raised at trial,

although it was then in existence but allegedly unknown to his trial counsel. More specifically, the question here is whether a defendant in a civil action may raise as error instructions which were given at the insistence of the defendant himself.

There is absolutely nothing new or significant in this Petition. The Supreme Court of Illinois considered the issues so insignificant that it declined even to hear them.

STATEMENT

Respondents present their additional statement of facts to include certain omissions in petitioner's statement.

Petitioner wrote a libelous letter to respondents' superior on July 21, 1958, accusing them of soliciting a bribe from his daughter and demanding disciplinary action or he would go to the newspapers. It is undisputed that these charges were false.

It is also uncontradicted, and the Appellate Court specifically found, that when Mr. Allyn wrote the libelous letter accusing respondents of soliciting a check, he knew this was not true, but that his daughter had suggested and volunteered to give them the check. (R. 42-44) (App. Ct. Op., App. 46) and that it was always Paul Power, the driver, who said he needed the $15.00 and not the respondents (R. 41, 42, 45; Add'l. R. 12); that petitioner made the inference there had been no traffic violation by placing the word "speeding" in quotes although he had no knowledge that the car was not speeding; that he knew the words "cash, what else" were incorrect and used that language to do respondents harm (App. Ct. Op., App. 45); that although he had no evidence, he had already adjudged respondents guilty, and if they were not disciplined, he was going to divulge his story to the

newspapers (App. Ct. Op., App. 46); and that even if he knew respondents had done a favor for Mr. Power and indirectly for his daughter, it is possible that he would have written a letter and asked for disciplinary action. (App. Ct. Ap., App. 46-47).

On appeal, petitioner had asked for judgment [not a new trial] on the theory that the standard announced in *New York Times* v. *Sullivan* was applicable to this case. Petitioner argued that the jury was improperly instructed [including instructions tendered by the petitioner and given at his instance], and that the judgment should be reversed without remand for lack of clear and convincing proof of the actual malice. The Appellate Court held that petitioner waived his right to raise the alleged violation of his constitutional rights in the Appellate Court for his failure to raise the point in the trial court, noting that *Times* was decided approximately three months prior to the trial. The Court also found it was unnecessary to determine whether the plaintiffs, who were policemen, were public officials within the *New York Times* rule.

Petitioner then petitioned the Supreme Court of Illinois for leave to appeal, and this petition was summarily denied so that the only opinion of record is that of the Appellate Court to which petitioner brings this petition for writ of certiorari.

ARGUMENT

I.

THE APPELLATE COURT PROPERLY HELD PETITIONER FAILED TO PRESERVE THE CONSTITUTIONAL QUESTION BY FAILING TO RAISE IT BY ANSWER, MOTION, OR IN ANY OTHER MANNER IN THE TRIAL COURT.

So that the Record is clear, in the Appellate Court petitioner asked for a reversal of these judgments as a matter of law, and at no time requested a new trial. His contention was that the trial court applied a constitutionally defective definition of actual malice. (App. Ct. Op., App. 30). The Appellate Court, without deciding whether this case was within the doctrine of *New York Times* v. *Sullivan,* stated that in any event the point was waived because it was not properly preserved in the trial court.

Petitioner in Point II of this Petition attacks this decision for a variety of reasons.

A. Petitioner now says Garrison and not Times is the criterion.

Petitioner has now coined the constitutional privilege he seeks to apply as the "Times-Garrison" doctrine. In the Appellate Court it was termed the "Times decision" in his original brief and the "Times-Garrison-Henry" doctrine in the reply brief. But by whatever name the petitioner wishes to term the doctrine, decision or standard, there should be no dispute that it was established in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), and that the decision was rendered three months prior to the trial of this cause. But, says petitioner, since the Court

in *Garrison* v. *Louisiana*, 379 U.S. 64 (1964) included in its language the fact that actual malice does *not* include ill will, the case which should govern waiver is *Garrison*.

A review of the decisions completely refutes this contention.

New York Times v. *Sullivan*, 376 U.S. 254 (1964), was decided March 9, 1964. In the decision, this Court reversed a libel judgment against the newspaper and spelled out the standard insofar as actual malice is concerned (376 U.S. at 279-280):

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—*that is, with knowledge that it was false or with reckless disregard of whether it was false or not.*" (Emphasis supplied.)

Next came *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), decided November 23, 1964. *Garrison* involved a criminal contempt proceeding of a District Attorney under a state criminal defamation statute for allegedly defaming certain state court judges. This Court struck down the statute and the conviction because the rule conflicted with the *New York Times* doctrine. The rule indicated malice could be based on an intent to inflict harm [ill will] and was therefore not within the *New York Times* rule. The issue of waiver was not present and in fact could not have been raised. In no part of the opinion did the Court indicate it was broadening, narrowing, enlarging, or deviating from the rule. The rule stands firm as originally stated: actual malice means with knowledge that it was false or with reckless disregard of whether it was false or not.

Simply stated, petitioner now complains that he was hurt *by an instruction he tendered.* By petitioner's Instruction No. 6, respondents had to prove "ill will towards a particular person, an actual intention to injure or defame him." Presumably his counsel at trial determined this was petitioner's best possible theory *for this case.* No instruction, motion or pleading was tendered, filed or even indicated at the trial deviating from this theory. No attempt was made to present not only what is included in the definition of actual malice in *New York Times,* but also what is not included in the definition as in *Garrison.*

But what mystified respondents was the fact that in the Appellate Court petitioner never even asked for a new trial, although his primary complaint was *that the instructions he tendered* were erroneous. He wanted judgment without a trial by jury on his new theory.

Petitioner in his Petition states that *Garrison* effected a post-trial change in the applicable constitutional standard. Respondents cannot accept this proposition as accurate. The *Times* decision is crystal clear in its definition of actual malice. The Court has not deviated an iota in subsequent cases. In any event, even if petitioner's present complaint were real, it was incumbent upon him at least to mention *New York Times* to someone at the trial, which he did not.

The Court below relied on *Pennsylvania R.R.* v. *Illinois Brick Co.,* 297 U.S. 447, 462-63 (1937) which is squarely on all fours with these facts (App. Ct. Op., App. 41-42), *i.e.,* that petitioner's failure to raise the point in the Circuit Court or present it to the Court in accordance with the practice that unquestionably was well established and reasonable, fails to preserve the point for review.

This fundamental rule has been followed consistently in this Court in later cases. *Michel* v. *Louisiana,* 350 U.S. 91, 101 (1955); *Memphis Gas Co.* v. *Beeler,* 315 U.S. 649, 651 (1942). Under the law of Illinois, the point clearly has been waived. *Blanchard* v. *Lewis,* 414 Ill. 515, 520, 521, 112 N.E. 2d 167 (1953); *City of Chicago* v. *Mulligen Enterprises,* 27 Ill. App. 2d 481, 489, 170 N.E. 2d 13 (1960); *Benson* v. *Issaco,* 22 Ill. 2d 606, 177 N.E. 2d 209, 210 (1961); *Libbra* v. *Mt. Olive & Staunton Coal Co.,* 29 Ill. App. 2d 396, 172 N.E. 2d 813 (1961); *Isham* v. *Cudlip,* 33 Ill. App. 2d 254, 179 N.E. 2d 25 (1962); *In re Estate of Leichtenberg,* 7 Ill. 2d 545, 131 N.E. 2d 487 (1956).

B. The Claim That The Complaint Fails to State A Cause of Action.

After two trials and two appeals, petitioner challenges the sufficiency of the complaint. [This Point was not raised in the Appellate Court.]

The Point hardly necessitates answer. It is refuted by the case cited by the petitioner himself. In *Gustafson* v. *Consumers Sales Agency,* 414 Ill. 235, 110 N.E. 2d 865 (1953), the Court held it was *not necessary* to adjudge whether Section 42 (3) of the Illinois Civil Practice Act was intended to permit waiver of all defects in substance even where the complaint failed to state a cause of action because the complaint therein stated an established category of liability. The court held the complaint has to be viewed with all inferences and intendments in its favor after verdict. The court stated that the complaint "clearly informed defendant of the nature of this cause and on the basis on which liability was predicated, and contained, both directly and by implication the essential elements for asserting a right of recovery." The court concluded

the omissions in the complaint in no way prevented a trial of the essential issues in the case, and any objections were deemed waived under the doctrine of "aider by verdict" or under Section 42(3).

Respondents submit that there is nothing omitted in their complaint. Paragraph 5 charges that petitioner, "well-knowing the premises" wrongfully, *maliciously*, wilfully, and *falsely* libeled them. (R. 2). The case was tried by petitioner on the theory of a conditional qualified privileged communication (R. 5-6) presumably because that theory was most suited to the facts in this case in that the respondents would have had to prove ill will and intent to injure the respondents.

Respondents take the position that the *New York Times* decision is not applicable to this case because the patrolmen were not public officials. But even if the complaint were tested under the *Times* decision, it adequately states a cause of action under the authority of *Gustafson* v. *Consumers Sales Agency*, 414 Ill. 235, 110 N.E. 2d 865 (1953). Petitioner was charged with wrongfully, maliciously, wilfully and *falsely* libeling plaintiffs, "well-knowing the premises."

This Point raised now is another in petitioner's late desperate attempts to avoid facing up to the damage his libel has caused.

C. The Claim That Error In The Instructions Was Properly Preserved.

The instruction that petitioner complains of is plaintiffs' instruction 4 indicating that the jury could consider circumstantial evidence in determining actual malice. Petitioner's counsel objected, but did not raise any constitutional grounds. In the post-trial motion again no constitutional grounds were raised, in opposition to this instruction.

It is settled law in Illinois that counsel must not only object to the contested instruction at the conference on instructions, but must point out specifically to the trial court wherein the instruction is faulty and the ground of his objection. *Gilman* v. *Lee,* 23 Ill. App. 2d 61, 68, 161 N.E. 2d 586 (1959); *Onderisin* v. *Elgin, J. & E. Ry. Co.,* 20 Ill. App. 2d 73, 155 N.E. 2d 338 (1959); *Jordan* v. *Jordan,* 35 Ill. App. 2d 265, 182 N.E. 2d 365 (1965); *Irwin* v. *Omar Bakeries, Inc.,* 48 Ill. App. 2d 297, 304, 198 N.E. 2d 700 (1964); *Stephenson* v. *Webb,* 27 Ill. App. 2d 312, 169 N.E. 2d 674 (1960).

It is equally well settled in Illinois that where error is claimed in the giving or refusal of an instruction, the claimed error must be included in the post-trial motion. "The motion should specify the grounds why the refusal (or giving) of the instruction was error, and if the party fails to do so, he waives the right of review." *Sny Island Levee Drainage Dist.* v. *Meyer,* 27 Ill. 2d 530, 190 N.E. 2d 356, 361 (1963); ch. 110, sec. 68.1, Ill. Rev. Stat. Petitioner is restricted "in a court of review, to the grounds or reasons specified in such *written* motion and will be deemed to have waived all other grounds or reasons for a new trial." *Nelson* v. *Union Wire Rope Corp.,* 31 Ill. 2d 69, 199 N.E. 2d 769, 793-94 (1964).

Petitioner cannot now claim error in the instruction. But in any event, he cannot stretch this purported error into a sufficient ground to preserve the constitutional question.

D. The Claim That The Appellate Court Had Discretion To Review The Merits Regardless of Waiver.

Petitioner's next contention to avoid waiver is that the instructions given, including those tendered by him, were so substantially erroneous they deprived him of a fair

trial and therefore can be raised for the first time on appeal.

The cases cited by petitioner simply do not support the proposition. They include five cases involving the misconduct of opposing counsel during the course of the trial. Petitioner also concludes that the "substantially erroneous instructions", specifically his own on the issue of ill-will, permitted affirmance by the Appellate Court on language in the letter "which merely reflected Allyn's mistaken, *but honest,* belief" that plaintiffs had solicited a bribe. The problem with this statement is that the jury, the trial judge, and a unanimous Appellate Court found defendant was neither mistaken nor honest in his letter.

In Illinois in a civil case a party cannot assign as error the trial court's giving of instructions requested by him. This rule is so patent that it scarcely requires citation. *Lundquist* v. *Friedmen's Inc.,* 366 Ill. 332, 8 N.E. 2d 625, 628 (1937); *Ronson* v. *McCurley,* 140 Ill. 626, 632 (1892); see generally 2 Illinois Law & Practice, sec. 674, pp. 602-03.

Petitioner relies on *People* v. *Bender,* 20 Ill. 2d 45, 54, 169 N.E. 2d 328 (1960), but *Bender* is inapplicable for several reasons. First, it was a criminal case (actually a sanity hearing), whereas this is a civil case. Secondly, the State's instructions were clearly erroneous, and under applicable Illinois procedure substantial defects in instructions in *criminal cases* "are not waived by failure to make timely objections thereto if the interests of justice require." Ch. 110, sec. 101.25, Ill. Rev. Stat. The Supreme Court of Illinois therefore had authority to overturn *Bender.* Here there is none.

It is clear therefore that the petitioner cannot shift his position in the Appellate and Supreme Courts to advance a new and different theory for reversal based upon the position that the lower court applied a constitutionally defective definition of "actual malice" or did not give a definition of malice as defined by the United States Supreme Court, since it was the petitioner himself who requested in his peremptory instructions the definition of "actual malice" that was given.

The petitioner cannot complain on appeal of any error committed at his own instance, for he cannot assign as error the procedure that he was a part of producing. If the theory advised by the petitioner was adopted it would not only greatly prejudice the respondents in this case, but would weaken the system of appellate jurisdiction, for it would lead to chaos in the orderly process of a trial. It would be the greatest injustice to hold the trial court accountable for an error assigned in the appeal courts for a position insisted upon by the petitioner himself in the trial court.

E. Conscious Waiver.

In this Point petitioner, in his last gasp, assumes there was a waiver under Illinois law, but says he is not barred because the "procedural forfeiture does not serve any legitimate State interest," citing *Henry* v. *Mississippi*, 379 U.S. 443 (1965). While we can debate for years the meaning of "procedural forfeiture", it is clear that the rule in *Henry* v. *Mississippi* has no application here. This rule was built from the following statement of Mr. Justice Holmes in *Love* v. *Griffith*, 266 U.S. 32, 33-4:

> "When as here *there is a plain assertion of federal rights in the lower court,* local rules as to how far it shall be reviewed on appeal do not necessarily prevail. . . ." (Emphasis supplied.)

In this case, there was no assertion of the federal right during the trial. In *Henry* v. *Mississippi,* the point was preserved by a motion at the close of the State's evidence for a directed verdict because of the erroneous admission of a police officer's testimony. It is manifestly clear that the doctrine of waiver ruled by the Appellate Court in a civil case has been uniformly recognized by this Court. *Pennsylvania R.R.* v. *Illinois Brick Co.,* 297 U.S. 447, 462-63 (1937); *Michel* v. *Louisiana,* 350 U.S. 91, 101 (1955); *Memphis Gas Co.* v. *Beeler,* 315 U.S. 649, 651 (1942).

In this point petitioner also contends that in a civil case, if a litigant is unaware of a constitutional defense at the time of trial and thereby fails to present it, he can present it for the first time on appeal. A waiver must be "conscious".

There is nothing in the Record to indicate defendant's trial counsel was unaware of *New York Times* v. *Sullivan.* With the widespread publicity the case received, presumably most of the people in this country knew about the case, both lay and legal. Petitioner has attached an affidavit to his petition without even requesting leave of this Court. Presumably he feels this is the safer procedure because the Appellate Court denied him leave. The affidavit purports to report the colloquy during the argument on the post-trial motion, long after the trial.

We would and have debated the propriety of filing this affidavit. We debate the contents of the affidavit, specifically the failure of respondents' counsel to object to petitioner's "right" to make the argument based on the *Times* case.

Presumably his trial counsel felt the doctrine was not applicable or that *in this case* he was in a better position to require evidence of ill will or intent to injury.

But even accepting the contents of the affidavit, respondents submit there is no case holding a waiver must be "conscious" in a civil case. In *Curtis Publishing Co.* v. *Butts,* 351 F. 2d 702 (5th Cir. 1965), the trial was completed *before* the decision in *New York Times* v. *Sullivan.* The Court nevertheless held there was a waiver because "for whatever tactical or other reason Curtis sat back and failed to carry the Constitutional torch before verdict and judgment." While in *Butts* it might be said the element of "conscious waiver" is present *before* the Supreme Court acts, consciousness or unconsciousness is not an element where the trial occurs three months *after* the decision as in this case.

It is simply evident that petitioner is grasping for straws at this stage. The raft of criminal cases he cites [which incidentally are not in point either in fact or principle] are an indication of his plight. This is a civil case for money damages between individuals, not the government against the accused. Defendant elected not to or failed to present the issue to the trial court, and cannot now change his theory on appeal.

II.

THE LIBEL WAS NOT CONSTITUTIONALLY PRIVILEGED.

Point I of the Petition contends and argues that the libelous letter was constitutionally privileged. In presenting argument in answer to this contention respondents in no way relax their position on the issue of waiver decided by the Appellate Court, but state in answer that even without waiver, petitioner's argument is without merit.

At the core of petitioner's argument is his insistence that respondents, as patrolmen, were "public officials"

as that term was used in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). The rationale of the rule in *Times* was stated to be a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270-272.

In subsequent cases, this Court held in *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), that state court judges were public officials, and in *Henry* v. *Collins,* 380 U.S. 356 (1965), that a county attorney and Chief of Police were public officials.

This Court's latest decision is *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966). In *Rosenblatt,* Baer was an area supervisor employed by three elected county commissioners. He had been discharged following a shift of control of the area into a commission. The defendant Rosenblatt wrote material criticizing generally the operation of the ski area, and Baer sued charging the defamation was directed toward him. The Supreme Court reversed a judgment for Baer and remanded the case for new trial. In so doing the court attempted to lay the following ground rules for future actions in light of *New York Times.* With respect to the "public official" issue, the Court held that the trial court in the first instance was to determine whether public officials were involved. The Court stated generally as to public officials:

> "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, *beyond the general public interest in the qualifications and performance of all govern-*

> *ment employees.*" (Emphasis supplied.) 383 U.S., at 87.

And again, the Court stated:

> "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, *entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.*" (Emphasis supplied.)

The apparent grounds for new trial in *Rosenblatt* were the following: (1) the trial occurred *before* the opinion in *New York Times* and therefore Baer should have the opportunity of presenting evidence to bring himself within the status of "public official"; and (2) the trial court's instructions permitted an award without regard to evidence that the defamation was not directed at Baer but possibly at the three elected officials who employed him.

Other action in the Supreme Court includes the denial of a petition for writ of certiorari in *Pape* v. *Time, Inc.*, 384 U.S. 909, rendering that decision final on the pleadings (discussed further below in this brief). Pending before the Supreme Court is *Curtis Pub. Co.* v. *Butts*, 351 F. 2d 702 (5th Cir. 1965), cert. granted, 385 U.S. 811 (1966).

Respondents have taken the liberty to attempt an analysis of the decisions by subject matter and respectfully submits from this analysis that in no event is there even a debatable question that these patrolmen were public officials.

A. Private Individuals With No Connection With Public Affairs.

(1) Not public officials:

(a) *Clark* v. *Pearson*, 248 F. Supp. 595 (D.C. D.C. 1965) (lawyer in private practice).

(b) *Dun & Bradstreet, Inc.* v. *Nicklaus*, 340 F. 2d 882 (8th Cir. 1965), *cert. den.*, 34 U.S. L.W. 3118 (U.S., Oct. 11, 1965).

(c) *Lorillard* v. *Field Enterprises, Inc.*, 213 N.E. 2d 1 (Ill. App. 1965).

B. Private Individuals With Some Connection With Public Affairs.

(1) Not public officials:

(a) *Meyer* v. *Joint Council 53, Int'l. Brd. of Teamsters*, 416 Pa. 401, 206 A. 2d 382, 388 (1965) (members and officers of opposing labor organizations engaged in a representation election are not public officials).

(b) *Faulk* v. *Aware, Inc.*, 14 N.Y. 2d 954, 202 N.E. 2d 372 (1964) (radio and television performer).

(c) *Spahn* v. *Julian Messner, Inc.*, 250 N.Y.S. 2d 529 (1964) (noted baseball player).

(d) *Dempsey* v. *Time, Inc.*, 252 N.Y.S. 2d 186 (1964) (noted boxer).

(e) *Youssoupouff* v. *Columbia Broadcasting System, Inc.*, 265 N.Y.S. 2d 754 (1965) (Russian prince who participated in the assassination of Rasputin).

(2) Held a public official:

(a) *Walker* v. *Courier-Journal & Louisville Times Co.*, 246 F. Supp. 231 (W.D. Ky. 1965) (former major general held a "public man" because of his "political prominence").

(b) *Gilberg* v. *Goffi*, 251 N.Y.S. 2d 823 (1964) (attorney who was a law partner of the mayor of a municipality).

(c) *Pauling* v. *National Review, Inc.*, 34 U.S.L.W. 2575 (N.Y. Sup. Ct., April 21, 1966) (private citizen who has, by his conduct, made himself a public figure and engaged voluntarily in public discussion of matters of grave public concern).

C. Federal, State And Municipal Elected Or Appointed Officials.

(1) Held public officials:

(a) *Proesel* v. *Myers Pub. Co.*, 48 Ill. App. 2d 402, 199 N.E. 2d 73 (1964) (President of Lincolnwood).

(b) *Mattassa* v. *Bel*, 246 La. 294, 164 So. 2d 332 (member of State house).

(c) *Vigoda* v. *Barton*, 204 N.E. 2d 441 (Mass. 1965) (superintendent and appointing authority of state hospital).

(d) *Clark* v. *Allen*, 415 Pa. 484, 204 A. 2d 42 (1964) (U.S. Senator).

(e) *Sheridan* v. *Crisona*, 14 N.Y. 2d 108, 198 N.E. 2d 359 (1964) (Borough president).

(f) *Schneph* v. *New York Post*, 252 N.Y.S. 2d 934, *aff'd.*, 16 N.Y. 2d 1011, 213 N.E. 2d 309 (1965) (civil attorney appointed by municipality).

(g) *Gersh* v. *Village of Tuckahoe*, 260 N.Y.S. 2d 75 (1965) (member of village planning and public library boards).

(h) *Raffa* v. *Shilbury*, 263 N.Y.S. 2d 866 (1965) (town supervisor).

(i) *Fegley* v. *Morthimer*, 204 Pa. Super. 54, 202 A. 2d 125 (1964) (member of district school board).

D. Candidates For Public Office.

(1) Held public officials:

(a) *Fignole* v. *Curtis Pub. Co.*, 247 F. Supp. 595 (S.D. N.Y. 1965) (candidate for President of Haiti).

(b) *Noonan* v. *Rousselot*, 48 Cal. Rptr., 817 (Cal. App. 1966) (candidate for Congress).

(c) *State* v. *Browne*, 86 N.J. Super. 217, 206 A. 2d 591 (1965) (candidate for mayor).

E. Former Office Holders.

(1) Not public officials:

(a) *Powell* v. *Monitor Pub. Co.*, 34 U.S.L.W. 2538 (N.H., March 1, 1966) (former state governor).

(2) Held public officials:

(a) *McCrossen* v. *U.S.*, 339 F. 2d 810, 813 (10th Cir. 1965) (President Eisenhower).

(b) *Lundstrom* v. *Winnebago Newspapers, Inc.*, 206 N.E. 2d 525 (Ill. App., 2d Dist. 1965) (former Mayor of Rockford by implication).

The foregoing indicates that state and even lower federal courts must decide for themselves what strata of public officials and public affairs are within or without the *New York Times* rule. We submit that this Court intended this to be an *ad hoc* determination by expressly defining its conception of "public official" only in general terms. Some courts have indicated their attitude in passing on the issue, such as *Clark* v. *Pearson*, 248 F. Supp. 595 (D.C.D.C. 1965) (*Times* is limited to "officials in high echelons"; "high-ranking public officials"); *Powell* v. *Monitor Pub. Co.*, 34 U.S.L.W. 2538 (N.H. 1966) (*Rosenblatt* offers no criteria "beyond its application to a 'posi-

tion in government [of] importance' " and possibly where the subject of discussion is "a question of pressing public concern.") This Court's decisions themselves make it clear that the new rule does not apply to lower governmental employees.

Respondents in this cause were regular patrolmen at the time of this occurrence, performing their normal perfunctory duties of traffic control. They were neither elected nor appointed, and had no supervisory power whatever. They were at the lowest rung of the police force and acting under specific orders from their superiors.

The Petition lists three "police" cases. Petitioner could include the *New York Times* case also since it involved an elected Commissioner of Police.

Pape v. *Time, Inc.,* 354 F.2d 558 (7th Cir. 1965), cert. denied 384 U.S. 909 (1966), concerned the appointed Deputy Chief of Detectives of the Chicago Police Department. His permanent rank at the time of the occurrence was lieutenant of police. The court held that in view of his "position", he was "a public official" as that designation was used in *New York Times* v. *Sullivan.* The case therefore is distinguishable in that the "positions" of the policemen in the instant case are ordinary patrolmen. The court further held that the defendant's article "had departed from fidelity" to a Federal Commission's report from which the material for the article had been taken "to make the article more interesting and readable for its audience." Whether Time acted with "reckless disregard" of the truth was therefore a fact question.

Gilligan v. *King,* 264 N.Y.S. 2d 309 (1965), involved a police lieutenant allegedly defamed by certain officials of civil rights organizations. The court held the lieutenant

was a public official and stated further that his title and function were not the "only criteria". The relation of the alleged libel to his official conduct and the public interest or concern in the publication were also considered in *New York Times.* But *Gilligan* has no relationship whatever to the instant facts. The policemen here were patrolmen, not lieutenants, and the issue was traffic control, not civil rights. Also *Gilligan* held that actual malice was a question of fact even under the *New York Times* rule. It "may be inferred from the language and tenor of the libelous statement or the extent or excessiveness of the publication thereof."

Respondents have been unable to read *Arscott* v. *Washington Post* (D.C. D.C. Civ. No. 1026-61, 1964) since it is unreported.

The Appellate Court in three separate places in its decision was careful to conclude that it rendered no opinion on the issue of public official in its holding of waiver. (App. Ct. Op., App. 36, 37, 43).

The foregoing demonstrates, therefore, that there is no authority presently compelling or even indicating the conclusion that respondents were public officials and therefore fair game for defamers. How far would petitioner carry his theory? To the manufacturers of police patrol cars?

Petitioner in his brief has masterfully constructed the duties of policemen controlling traffic into one of the most vital of governmental functions. This conclusion comes somewhat as a surprise to Respondents and one would suppose to their colleagues on the force. They had no idea their daily work qualified equally with such issues as civil rights and Communism. They can only attribute their sudden importance to Petitioner's sudden urge to

bring his defamation within the *New York Times* standard.

Respondents respectfully submit that there is no reason for this Court to review the issues stated by petitioner. The Court has established guide lines which, if raised properly, would give petitioner whatever relief he seeks. The trouble is, the issues were never raised in the trial court.

III.

THE EVIDENCE SHOWS UNEQUIVOCALLY THAT AT THE TIME PETITIONER WROTE THE LETTER HE KNEW THE DEFAMATION WAS FALSE OR ACTED WITH RECKLESS DISREGARD OF TRUTH OR FALSITY.

Again respondents state that in presenting this Point, they in no way relax their position on the propriety of the Appellate Court's ruling on waiver. They simply wish to convey to the court the proposition that the evidence shows actual malice on the part of petitioner under *any* standard, be it constitutional or otherwise.

Since petitioner asked for judgment as a matter of law in the Appellate Court and seeks the same relief here, the familiar rule applicable to the quantum of proof necessary to support the verdict is whether there was, in the record, any evidence, which, standing alone and taken with all its intendments most favorable to respondents, tended to prove the material elements of their case. *Lindroth* v. *Walgreen Co.*, 407 Ill. 121, 94 N.E. 2d 847, 851 (1950); *Garrett* v. *S. N. Nielsen Co.*, 49 Ill. App. 2d 422, 200 N.E. 2d 81, 84 (1964); *Hedge* v. *Midwest Contractors' Equipment Co.*, 53 Ill. App. 2d 365, 202 N.E. 2d 869, 872 (1964).

The Appellate Court specifically found that when petitioners wrote the letter accusing respondents of solicit-

ing the bribe, he *knew* respondents did not solicit the check from his daughter but that it was Paul Power who said he needed $15.00 and his daughter volunteered to give them a check; that petitioner falsely made the inference there had been no traffic violation by placing the word "speeding" in quotes; that he knew the words "cash, what else" were incorrect and used that language to do plaintiffs harm; and that although he had no evidence, he had adjudged plaintiffs guilty, and if they were not disciplined, he was going to divulge his "story" to the newspapers. (App. Ct. Op., App. 45-47).

It is evident therefore that petitioner colored the known facts to fit them within his libel.

The testimony at the trial conclusively proved that the petitioner when he wrote the letter accusing the respondents of a crime, knew the letter was false and he wrote it with the intent to inflict harm on the respondents through such falsehood or he wrote it with reckless disregard as to whether it was false or not.

Th testimony of Sue Owens, one of the occurrence witnesses testifying on behalf of the petitioner clearly stated it was her best recollection that she told Mr. Allyn that it was his daughter who volunteered the check; and furthermore, she absolutely stated that the police (respondents) had never made any attempt to solicit a check from Dorothy Allyn, Mr. Power, or Sue Owens herself. (R. 42). She further stated that she told Mr. Allyn that Paul had told them he needed $25.00 and that it never was the policemen. (R. 44-45, Addl. R. 12). Her testimony showed that the petitioner knew the letter was false when he wrote it, and he wrote it with the intent to inflict harm through such falsehood or he wrote it with reckless disregard as to whether it was false or not. Her testimony on that pertinent point is as follows:

"Mr. Burns: Q. In your conversation with Mr. Allyn, do you remember whether or not you told Mr. Allyn that his daughter had been the one who had volunteered the check.

A. Well, I imagine I told him. I can't recall exactly. I can recall Dorothy doing it, so I imagine that is what I told him.

Q. You best recollection was that you told Mr. Allyn that it was his daughter who was the sole volunteer of writing this check, is that correct.

A. I believe that would be correct." (R. 44).

It has always been the law that the issue of actual malice is one of fact for the jury. See *Hirsch* v. *Feeney*, 83 Ill. 548, 549 (1876) for the leading case in Illinois. See also *Friedes* v. *Sani-Mode Mfg. Co.*, 33 Ill. 2d 291, 211 N.E. 2d 286 (1965); *Ruesch* v. *Anderson*, 75 Ill. App. 526 (1897).

Particularly significant is the case of *Pape* v. *Time, Inc.*, 354 F. 2d 558, 560 (7th Cir. 1965), *cert. den.*, 384 U.S. 909 (1966). The court said:

"We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false."

"As stated in our previous decision—". . . Time took the risk when it reworded part of the Commission's Report that it might go too far. . . ." We noted that Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 Fed. 2d at page 655)—"It is our opinion that a jury could read the Time article as stating that

the Report said Pape and his fellow (sic) officers *did* what the Commission Report merely said the Monroe Complaint *alleged they did.*" (Court's italics.)

"We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment."

CONCLUSION

Respondents respectfully submit that the constitutional issues raised by the Petition were never raised in the trial court by the appropriate means available, a ruling made by the trial court on such issues, and, which ruling was preserved in the Record for review. Since such constitutional issues were not raised in the trial court, they cannot be urged for the first time in the Courts of Review, and the failure to raise such defenses in the trial court on such constitutional issues amounts to a waiver by the petitioner of such defenses.

The petitioner tried this case based upon his theory of a defense of a conditional qualified privileged communication, and he cannot now in the Courts of Review shift his theory on appeal to another and different theory. The petitioner freely chose his type of defense, fully tried his case based upon such a defense, and he cannot now plead in the Courts of Review, in order to avoid the fair verdict and judgments entered against him, that he was uninformed of possible constitutional defenses, and thus by using this faulty premise of ignorance be able to claim that he had not waived such constitutional defenses.

This face-saving procedure based upon the alleged claim of ignorance on the part of the attorney who tried the case on behalf of the petitioner, was never made by him in the Record but this claim is made by the attorneys representing the petitioner on appeal and is a completely self-saving hearsay declaration, and is made without the slightest shred of evidence to substantiate it. This alleged claim of ignorance on the part of the defendants trial attorney, and which is untenable on any grounds, is outside of the Record, and consists strictly of a gratuitous self-serving assumption made without any foundation on fact, and made solely and expressly for the purpose of seeking to avoid the legal effects of his failure to plead a defense based upon constitutional grounds. This type procedure has no place in the law, and its use should not be allowed as a device to overturn the verdicts and judgments obtained by the respondents.

The respondents respectfully submit that the decision of the Appellate Court affirming the judgments of the trial court on the verdicts of the jury are proper, and the respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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